

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02-0086
SALES/USE TAX
For Years 1998 and 1999**

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax—Maintenance Agreements

Authority: Sales Tax Information Bulletin #2 (August 1991); 45 IAC 2.2-4-2; IC 6-8.1-5-1

Taxpayer protests the imposition of gross retail tax on transactions performed under maintenance agreements that taxpayer has with third parties.

II. Sales/Use Tax—Software Maintenance Agreements

Authority: Sales Tax Information Bulletin #2 (August 1991)

Taxpayer protests the imposition of gross retail tax on services and software upgrades performed under software maintenance agreements that taxpayer has with third parties.

III. Sales/Use Tax—Sale of Telecommunication Services to Public Utilities

Authority: Sales Tax Information Bulletin #51T (January 2003); IC 6-2.5-4-6(b)

Taxpayer protests the imposition of gross retail tax on satellite feeds sold to taxpayer as a provider of telecommunication services.

IV. Sales/Use Tax—Rental Agreements Exceeding 30 Days

Authority: IC 6-2.5-4-4 ; 45 IAC 2.2-4-8(b)

Taxpayer protests the imposition of gross retail tax on storage unit rental costs for property rented for a period exceeding 30 days.

V. Sales/Use Tax—Proof of Sales Tax Paid

Authority: none

Taxpayer protests the imposition of gross retail tax on items for which an invoice demonstrates that sales tax has previously been paid.

VI. Sales/Use Tax—Use Tax Accrued

Authority: none

Taxpayer protests the imposition of gross retail tax on transactions for which use tax has already been accrued.

VII. Sales/Use Tax—Bulk Mailing

Authority: none

Taxpayer protests the imposition of gross retail tax on bulk mailing transactions.

STATEMENT OF FACTS

Throughout the year, taxpayer purchased tangible personal property and services, along with maintenance agreements that accompanied some of the tangible personal property. Some of these purchases were picked up on audit as being subject to gross retail tax for various reasons.

DISCUSSION

I. Sales/Use Tax—Maintenance Agreements

Taxpayer protests the assessment of use tax on items that taxpayer has labeled maintenance agreements. Taxpayer has provided the Department with invoices and copies of canceled checks that indicate payment for the service. While the canceled checks provide little assistance in determining the nature of the transaction in question, the invoices state that the payment is for a maintenance agreement. However, these invoices fail to clearly demonstrate whether or not taxpayer is paying for services or tangible personal property used in fulfilling the contract.

Maintenance agreements that also contain provisions for periodic services where tangible personal property will be supplied as a part of the unitary price fall within the ambit of 45 IAC 2.2-4-2. Sales Tax Information Bulletin #2 (August 1991).

45 IAC 2.2-4-2 reads:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

It is therefore essential to the disposition of the matter that the service agreements be available for inspection to determine their nature. Because taxpayer has not complied with repeated requests to produce these agreements, it is therefore impossible to determine their nature and therefore determine if tangible personal property was contemplated to be transferred during the servicing of the various items for which maintenance agreements were entered.

The notice of proposed assessment is *prima facie* evidence that the Department's claim for unpaid tax is valid, and the burden of proof that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC 6-8.1-5-1.

Taxpayer has not produced sufficient evidence to rebut the Department's assessment.

FINDINGS

The taxpayer is respectfully denied.

II. Sales/Use Tax—Software Maintenance Agreements

DISCUSSION

Similar to the maintenance agreements above, taxpayer has entered into a software maintenance agreement with a third party. However, unlike the above maintenance agreements, taxpayer has submitted the software maintenance agreement for inspection by the Department.

The agreement calls for the third party to "furnish and license Customer (taxpayer) with upgraded versions of the software licensed to (taxpayer) under the ... (c)ontract. Such upgrades shall be delivered at such time as they are generally made available by (c)ompany (third party) to its (c)ustomers."

Sales Tax Information Bulletin #2 states:

Optional extended warranties and maintenance agreements are offered as a separate added amount to the purchase price of property being sold and a fixed sum is charged for the furnishing of tangible personal property throughout the term of the warranty or the agreement. Optional warranties and maintenance agreements are not subject to sales or use tax. Optional warranties and maintenance agreements are not subject to tax because the purchase of the warranty or maintenance agreement is the purchase of an intangible right to have property supplied and there is no certainty that property will be supplied. However, if the agreement includes a charge for property to be periodically supplied the agreement would be subject to tax.

At first blush, it seems that the agreement calls for the third party to regularly supply taxpayer with upgrades, taking it out of the realm of the optional extended warranty exemption. However, because the contract makes no guarantees that upgrades will ever be produced by the third party, taxpayer has merely purchased an intangible right to have property supplied should the third party decide to upgrade its software.

FINDINGS

The taxpayer is sustained.

III. Sales/Use Tax—Sale of Telecommunication Services to Public Utilities

DISCUSSION

Taxpayer has been assessed gross retail tax on its purchase of satellite transmissions from a third party and has protested this assessment. Taxpayer claims that, according to Sales Tax Information Bulletin #51T (January 2003), "the sale of telecommunication services to public utilities or any provider of telecommunication services are (sic) not subject to sales or use tax." Taxpayer is a broadcaster and not a provider of telecommunication services and the exemption discussed in Tax Information Bulletin #51T does not apply. Additionally, taxpayer is the recipient of the telecommunication services contemplated in IC 6-2.5-4-6(b):

- (b) A person is a retail merchant making a retail transaction when the person:
 - (1) furnishes or sells an intrastate telecommunication service; and
 - (2) receives gross retail income from billings or statements rendered to customers.

The transmissions at issue appear to be interstate in nature and are therefore not subject to tax.

FINDINGS

The taxpayer is sustained.

IV. Sales/Use Tax—Rental Agreements Exceeding 30 Days

DISCUSSION

Taxpayer was assessed sales tax based on the leasing of accommodations (45 IAC 2.2-4-8(b)) for a transaction in which taxpayer rented a storage unit at a self-storage facility from a third party. There is no indication that human beings ever occupied the storage unit, and the term "storage unit" implies that the space is not being utilized, nor is it fit for being utilized, as space intended for occupancy by human beings. The storage unit rental is the rental of real property, thus it is not considered tangible personal property per IC 6-2.5-4-4 and therefore falls outside of the regulation.

Therefore, inasmuch as the storage space is real property and not an accommodation, the Department has no legal basis for assessing tax on its rental.

FINDINGS

The taxpayer is sustained.

V. Sales/Use Tax—Proof of Sales Tax Paid

DISCUSSION

Taxpayer has produced invoices that show sales tax was previously paid on two transactions for which the audit generated an assessment against taxpayer. These invoices are sufficient evidence that taxpayer has already paid the sales tax due.

FINDINGS

The taxpayer is sustained.

VI. Sales/Use Tax—Use Tax Accrued

DISCUSSION

Taxpayer has produced invoices that show use tax was previously accrued on one transaction for which the audit generated an assessment against taxpayer. These invoices are sufficient evidence that taxpayer has already accrued the use tax due.

FINDINGS

The taxpayer is sustained.

VII. Sales/Use Tax—Bulk Mailing

Taxpayer purchased a bulk mailing project in a transaction that was assessed sales tax in its entirety. Taxpayer has submitted the invoice for the purchase, which contains hand-written breakouts of the postage, freight charges, and other services. Taxpayer claims that, in accordance

with a Revenue Ruling, when an invoice breaks out non-taxable services from taxable retail sales, the individual components of the transaction should be considered separately. In other words, the retail sale should be taxed and the services should not. It should be noted that Revenue Rulings are only binding with respect to the taxpayer to which they are issued.

Taxpayer takes a very open view of the Revenue Ruling. This ruling was specifically designed to deal with service charges related to the banquet and catering industry. Even if the Department were to adopt such a liberal view and apply it to a bulk mailing project, taxpayer has not met its burden of production in this case.

The invoices provided to the Department are hand-written and were added to original source documents after the audit was completed. Absent further evidence that the transaction is as taxpayer submits that it is, the Department cannot find in taxpayer's favor.

FINDINGS

The taxpayer is respectfully denied.